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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

FLUIDIGM CORPORATION, a Delaware corporation; and FLUIDIGM CANADA, INC., a foreign corporation,	)	
Plaintiffs,	)	
VS.	)	**NO. C 19-05639 WHA**
IONPATH, INC., a Delaware corporation,	)	
Defendant.	)	

San Francisco, California
Thursday, June 18, 2020

TRANSCRIPT OF TELEPHONIC PROCEEDINGS

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(APPEARANCES CONTINUED ON FOLLOWING PAGE)

REPORTED BY: Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
Official Reporter

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Thursday - June 18, 2020 **8:00 a.m.**

P R O C E E D I N G S

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THE CLERK: Please come to order. This court is now in session. The Honorable William Alsup presiding.

Calling case 19-5639, Fluidigm Corporation, et al., versus IONpath, Inc.

Counsel, beginning with plaintiffs' counsel, state appearances, please.

MR. WILLIAMSON: Good morning, Your Honor. This is Nick Williamson from Bryan Cave Leighton Paisner on behalf of plaintiff Fluidigm.

MS. MEHTA: Good morning, Your Honor. This is Sonal Mehta from the WilmerHale firm on behalf of defendant IONpath, and with me today is my colleague Josh Furman who will be handling the argument for IONpath.

THE COURT: Great. Anyone else?

(No response.)

THE COURT: Okay. Please, when you speak, identify yourselves for the court reporter.

I'm up to speed on what the issue is. I'd like to give each side a chance to make their main argument, their main point, but not very long; and each side --

So let me just say to everyone else, if you sign on or off, it makes that irritating beep sound and I lose track of

what's being said so, please, wait until we have a good break before you sign off. I suspect those are people who are signing in, but I don't know.

Okay. So let's start with the defendant who's making the motion. Please go ahead.

MR. FURMAN: Thank you, and good morning, Your Honor. This is Josh Furman for defendant IONpath.

So just to -- I know you're up to speed, but to set the stage, IONpath has asked for, as part of its interrogatory, its properly enabled to Fluidigm's limitation-by-limitation contentions as to how each element of the claims is allegedly met by each allegedly embodying product.

While Fluidigm has provided a response to this interrogatory, they have not provided an element-by-element analysis. Instead, their charts that they provide show broad-strokes information and on a claim-by-claim basis. Where this falls short is that it fails to provide notice to IONpath, clear notice, as to how Fluidigm contends that these products actually do practice the claims.

What I would like to address today really falls quickly into three buckets. First is why this information --

THE COURT: No, no. You don't get three.

MR. FURMAN: Okay.

THE COURT: You get one.

MR. FURMAN: Sure.

THE COURT: So make your best point.

MR. FURMAN: Okay. Well, to address -- I'll say that the relevance of these products hasn't actually been disputed so I will focus on why what Fluidigm has provided is not sufficient.

What they've produced to us are a set of charts; and if Your Honor has Exhibit F to IONpath's brief available --

THE COURT: No, I don't have it.

MR. FURMAN: You don't. It's quite all right.

THE COURT: I just have a summary, but I understand the issues so I don't need to see the chart.

MR. FURMAN: Fine. Not a problem at all.

So the chart that they provided, it is a chart but, at the end of the day -- and what we've included here, while it's just an excerpt, it fit into Your Honor's standing order in terms of the 12-page limit -- it shows, for instance, one of the claims that's included in the showdown procedure, and we have on the left side the entire claim bundled into a single cell and on the right-hand side just four screen shots of web pages and user guides and a sentence or two that provides a small amount of detail.

What it doesn't provide is the element-by-element analysis; and to be more specific there, just as an example, the claim -- this claim requires a first device to do a number of things and a second device to do a number of things.

When we look to the screen shots, there are several elements described relating to this allegedly embodying product, but there's no explanation of what is the first device from among those things described and, more importantly, what is not the first device described.

And then it goes on -- you know, the claim goes on to include other elements, such as detecting a transient and the use of a lanthanide or noble metal, and for these things -- for these elements of the claim, there's simply no mapping. And why that's important at the end of the day --

THE COURT: All right. I don't care why that's important.

Let me ask you a question. The other side says, look, for lost profits, it doesn't have to read on -- the claims don't have to read, all they've got to do is show that there are no noninfringing alternatives; and if the public didn't buy your product, they would have had to buy their product even though it doesn't fall within the claim language because there are no noninfringing alternatives. So what do you say to that argument?

MR. FURMAN: So I would say two things. Number one, while they could make that argument, that's not the argument that they've made. Fluidigm's damages contentions put these embodying products squarely at the center of what's at issue.

The other thing --

THE COURT: Read to me -- what do you base that on? Read to me what you base that on.

MR. FURMAN: So in Fluidigm's damages contentions, they have stated that their proprietary products, the CyTOF Helios and Hyperion mass cytometry technologies, practice and utilize the inventions claimed in the patent, and they use that to support their demand for the patented product under their lost profits and losses.

THE COURT: Wait, wait, wait. Are you reading it to me or are you summarizing it?

MR. FURMAN: I am quoting but slightly out of order, and this was in Exhibit B.

THE COURT: Read the exact quote so I can -- because if they, in fact, did say that, I might agree with you. So I'd like to hear where the lost profits analysis is pitched by plaintiff --

MR. FURMAN: The heading --

THE COURT: Go ahead.

MR. FURMAN: Sorry.

The heading says "A Demand for the Patented Product," and it says (reading):

> "There is a strong and growing market for mass cytometry instruments and reagents as demonstrated by sales that have already been made by both parties and the technology's potentially revolutionary effect on

personalized cancer treatment. Fluidigm has made significant sales of its products and services but practice and utilize the inventions claimed in the asserted patents; namely, its proprietary CyTOF Helios and Hyperion mass cytometry technologies, Maxpar reagents, and therapeutics insights surface."

THE COURT: All right. Hold that thought. I want to see what the other side says to what I just heard.

Please go ahead.

MR. WILLIAMSON: Good morning, Your Honor. This is Nick Williamson for plaintiff Fluidigm.

I think that the issues here are fairly well laid out in the parties' letter briefs, and I wanted to key in on what we see as an important issue here, Your Honor, and that's that in every case that defendants have cited -- in the *Infernal Technology* case, in the *Blast Motion* case, in the *Apple* case, in the *LifeNet* case, and in the *Ultimate Pointer* case -- the plaintiffs had either refused to provide any response or had simply relied on documents under Rule 33 of the Federal Rules of Civil Procedure.

Here we have a very different posture where Fluidigm has provided 17 pages of detailed charts providing sufficient notice to defendant IONpath of why Fluidigm believes that the products and methods practice the asserted claims that we'd see as a substantial distinguishing factor on top of the

overbreadth and burdensome nature of the original interrogatory, which demanded properly objectionable information well beyond what is now sought with this limited --

THE COURT: Well, how can it be burdensome? How can it be burdensome for you? You had the patent owner to identify how your own products practice the claimed patents -- claimed inventions. To me you ought to be able to do that in about two hours. I don't see why that's burdensome. This is information totally within your control. What's so burdensome about that?

MR. WILLIAMSON: I understand that, Your Honor, and that is -- the unduly burdensome nature comes in with trying to break this down on an element-by-element or a limitation-by-limitation chart.

We've already provided --

THE COURT: You can do that -- listen, you can do that in two hours. If you can't, you've got no case. This is ridiculous. You could do that. I don't understand why you're resisting this.

I know why you're resisting it. It's because you're afraid to go on record because it's going to hurt you in other cases. I understand how these patent cases work. You're desperate to avoid taking a position on this. So you're going to lose this point.

All right. I'm ready to make a ruling. Are you ready to take down my ruling?

MR. WILLIAMSON: Yes, Your Honor.

THE COURT: All right. I'm ordering the plaintiff to do a claim chart limitation-by-limitation on why and how its own products that it claims are lost profits or would be evidence of commercial success of the invention, how each claim, not the patent, each claim that is asserted reads on those patents -- I'm sorry -- reads on those products.

The reason for this is it's relevant in two respects. First, on account of lost profits contentions as set forth in the plaintiffs' own interrogatory answer. Now, I want to say that I recognize that even products that do not read on it might serve as the basis for lost profits if and only if there is no noninfringing alternative; but given the way that the plaintiff has pitched it in the interrogatory answer, you are stuck with your answer and you're not going to wiggle off even though it may hurt you in some other case. You're going to be specific or I'm going to throw out your case.

Number two reason that it's relevant is because of commercial success. You're claiming that this is the greatest thing since sliced bread -- okay -- and that your own products prove that; but if your own products don't practice the actual limitation by limitation, it's irrelevant. It must be limitation by limitation read exactly on the claims or it doesn't count for commercial success.

All right. That's the ruling and you're going to answer

this, and I'm going to make you pay the fees of the other side for being obstinate and requiring this hearing. This was unwarranted. You should have answered this. You're the plaintiff. A plaintiff is supposed to open up the doors and say "Come get my discovery." Instead, you are stonewalling like a big law firm. Do not do that.

Okay. I want the plaintiff -- I'm sorry -- the defendant to prepare a form of order that captures what I just said.

Now, I want to say to you, Defendant, if you overreach and try to slip things in there that I have not ruled in your favor on, then I'm going to deny your relief. So please do not try to slip in extra things.

I'll give you three weeks in order -- in which to answer -- to give proper answers to this interrogatory.

Any product for which you do not do this, you will not be allowed to rely on it at trial for any purpose. So be aware of that. If you're going to assert this at trial or on summary judgment as a basis for commercial success or lost profits or for any other reason where the contention is it reads on the patent, then you must identify it now.

And I want to say one other thing. Sometimes a product has two different versions. It has Version A, then it has Version B. It will not be enough to say, "Oh, here's Version A. That's good enough." Any version that you say reads on the limitations must be identified with a claim chart.

So if you've got four versions of the particular product and you're going to contend at trial all four versions, then you have to identify for all four versions because I have found, sadly, in other cases that only one product -- only one arguably fits and the plaintiff is trying to skate by by claiming that all of them, you know, is representative. No, no representatives. You've got to do it version by version, product by product.

All right. That's the ruling.

Thank you, Counsel. I'm sorry, I've got other hearings to go to and good luck to both sides.

MR. WILLIAMSON: Thank you for your time, Your Honor.

MR. FURMAN: Thank you, Your Honor.

MS. MEHTA: Thank you, Your Honor.

(Proceedings adjourned at 8:14 a.m.)

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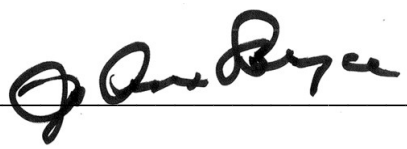
CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Saturday, June 20, 2020



Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
U.S. Court Reporter